

# **FUNDAMENTALS OF TRIAL ADVOCACY COURSE**

September 19-23, 2016  
Phoenix, Arizona



## **ADMITTING EVIDENCE**

Presented by:

**AMY DIEDERICH**

Deputy Pinal County Attorney  
Florence, Arizona

Distributed by:

**ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL**  
1951 West Camelback Road, Suite 202  
Phoenix, Arizona 85015

**ELIZABETH ORTIZ**  
**EXECUTIVE DIRECTOR**

## Admitting Evidence

Amy Diederich  
Deputy County Attorney  
Pinal County Attorney's Office  
Major Offender's Bureau

---

---

---

---

---

---

---

---

## Evidence.....and why it matters

- Evidence is the way in which we prove each element of our case at trial
- It has the potential to corroborate our witness' testimony, to help jurors choose between conflicting accounts, and to paint a picture of what actually occurred in a case
- Bottom Line: If you want to win, your evidence must persuade the jury




---

---

---

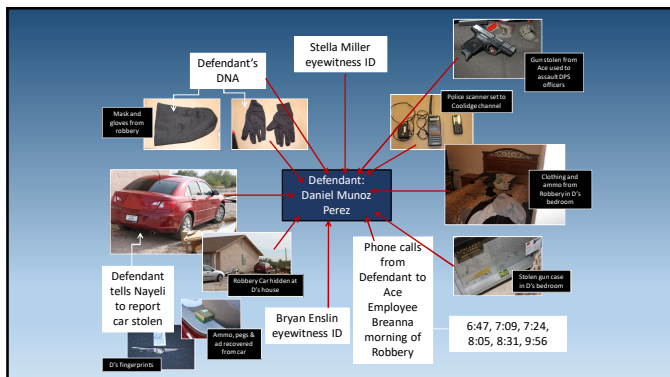
---

---

---

---

---




---

---

---

---

---

---

---

---

## Common Physical Evidence

- Photographs
- Video
- 911 calls
- Documents
- Lab Results
- Guns, Knives, other Weapons
- Drugs
- Clothing
- Blood
- DNA
- Bullets and Shell Casings
- Fingerprints
- Impressions (shoe, tire, etc.)
- Digital evidence

---

---

---

---

---

---

---

---

## Different Kinds of Evidence

- Only substantive evidence which is properly admitted will go back to the jury for use in their deliberations
- Other evidence may be utilized at trial, and referred to in the record, but will not go back to the jury
  - i.e. demonstrative, impeachment, unredacted, etc.
- You must always be aware of which type of evidence something is. It is YOUR responsibility to safeguard your hard work in trial by making sure the jury only gets what they should

---

---

---

---

---

---

---

---

## Admitting Evidence

Before we can use this evidence in our case though, it has to be properly admitted by establishing relevance, laying foundation, and overcoming objections

In this course we will discuss:

- Preparing Evidence for Trial
- Step-by step approach to admitting evidence which can be used with anything you admit
- Appropriate handling of evidence in court
- Common Pitfalls and responding to objections

---

---

---

---

---

---

---

---

## Preparing for Trial

- Elements – Look to your jury instructions
- Decide which evidence you need admitted. Just because it exists, doesn't mean you must use it
- Think about demonstrative evidence which maybe helpful or persuasive in your case
- Think through foundation. Who will you need to establish your evidence is what you say it is? Is foundation statutory for anything you are using?




---

---

---

---

---

---

---

---

## Preparing for Trial

- Utilize a Case Overview Form to detail exactly what evidence you have to prove each element of your charges
- Meet with Case Agent and view evidence in impound
- Create an Exhibit List
- Pare down photographs
- Make redactions as necessary
- Arrange a pre-trial discovery meeting with Defense
- **Get the evidence to court!**

---

---

---

---

---

---

---

---

## View the Evidence

- You should NEVER see your evidence for the first time in court
- Avoid surprises
- Last-minute discovery issues
- Help prepare witnesses
- Anticipate defenses
- This may change your case in a significant way!!!

---

---

---

---

---

---

---

---

## Prepare Your Witnesses

- During trial preparation, let each witness know what evidence you intend to admit through their testimony. Avoid surprises on the witness stand
- Witnesses may need to refresh their memory prior to testifying about times, dates, locations, etc, in order to lay foundation for exhibits
- Witnesses may need to authenticate exhibits by identifying their own voice, handwriting, words, etc. This review can be done prior to court and outside the presence of the jury in many instances in order to save time and avoid confusion during testimony

---

---

---

---

---

---

---

---

## Prepare Your Exhibits

- Make Redactions
  - Both redacted and unredacted versions will need to be admitted to preserve your record, but only redacted versions will go to the jury
- Create an Exhibit List
- Get exhibits marked by clerk (or mark yourself if there is no clerk to manage exhibits)
- Think about foundation: Who do you need to identify something? Authenticate it? Thinking through foundation appropriately may result in additions to your witness list

---

---

---

---

---

---

---

---

## Arizona Rules of Evidence

- Article 8: Hearsay
- Article 9: Authentication and Identification
- Article 10: Contents of Writings, Recordings, and Photographs




---

---

---

---

---

---

---

---

## Foundation

What kind of evidence do you have?

Which Arizona Rules of Evidence and/or statutory rules apply to your evidence?

Are there multiple layers of hearsay?

Do you have documents which are self-authenticating? Or, do they require additional foundation for authentication?

### Self-Authenticating:

Evidence may be admitted at trial without additional proof being submitted that the item is what it appears to be

### Needs Authentication:

Proponent must produce evidence that item is what it appears to be

---

---

---

---

---

---

---

---

## Once in Court - Organize

- Sort your physical evidence by witness
- Arrange the evidence you will need in the courtroom prior to each witness so you don't keep the jury waiting
- Group photographs by subject, area, specific item, or location in order to admit in groups
- If you have a large number of evidence, have your case agent unseal all envelopes, bags, boxes, etc, you are going to use prior to calling the witness who will be admitting it. Do this in the presence of defense counsel to avoid chain of custody arguments

---

---

---

---

---

---

---

---

## Admitting Evidence: Step-by-Step

1. Show the exhibit to opposing counsel
2. Ask permission to approach the witness
3. Identify the exhibit to which you are referring for the record
4. Clearly show the exhibit to the witness
5. Ask questions of the witness to lay appropriate foundation
6. Request that the exhibit be admitted
7. Request permission to publish to the jury
8. Return the exhibit to the clerk

---

---

---

---

---

---

---

---

### Step 1: Show the Exhibit to Opposing Counsel

- In order to be courteous, and avoid interruption during your questions, always show the exhibit you are planning to use to defense counsel before approaching
- This way, counsel can't claim to be surprised by anything related to the exhibit, or claim not to have seen it before

---

---

---

---

---

---

---

---

### Step 2: Ask permission to Approach the Witness

- Never approach a witness at any point during the trial without first receiving permission from the judge
- Many judges will give you standing permission, but some do not
- You never want to be subject to reprimand from a judge in front of your jury
- Juries expect this kind of deference and courtroom protocol

---

---

---

---

---

---

---

---

### Steps 3 and 4: Identify the Exhibit and Show it to the Witness

- Always be aware of making a record. Once you have permission to approach, state for the record with which exhibit you are going to be working
- Hand the exhibit to the witness without showing it to the jury. Don't publish an exhibit without admitting it first. Allow the witness to examine the exhibit as needed in order to familiarize themselves with it
- "Mr. Smith, I am showing you what has been marked as State's Exhibit 9 for identification"

---

---

---

---

---

---

---

---

### Step 5: Ask the Foundational Questions

In order to admit a piece of evidence, we only need to establish that the evidence is what we purport it to be

To accomplish this, we need to show 3 things:

- Recognition
  - Identification
  - Authentication
- Just remember R.I.A.

---

---

---

---

---

---

---

### Step 5: Ask the Foundational Questions

- Because this is the only necessary foundation, asking the correct questions to lay foundation is actually quite simple, and can usually be accomplished with 3-4 questions:

1. *"Do you recognize it?"* (recognition)
2. *"What is it?"* (identification)
3. *"How do you recognize this as \_\_\_\_\_?"* (authentication)

---

---

---

---

---

---

---

### Step 5: Ask the Foundational Questions

- If an exhibit is a representation of something else, or has been altered in any way since it was collected, a 4<sup>th</sup> clarifying questions is needed:

For a photo, video, diagram, or other representation:

4. *"Is this a fair and accurate depiction of \_\_\_\_\_?"*

For an exhibit that has been altered in some way:

4. *"Is this in the same or substantially the same condition as when you found it?"*

---

---

---

---

---

---

---



## Step 5: Ask the Foundational Questions

Example: Admission of a scene photograph

- "Mr. Witness, I'm showing you what has been marked as State's exhibit 11 for identification. Do you recognize it?"
- "What is it?"
- "How do you know this is a photograph of the Defendant's house?"
- "Is this a fair and accurate depiction of the Defendant's house on the night of December 12, 2013?"

---

---

---

---

---

---

---

## Step 6: Request Admittance

- Once you have laid appropriate foundation for your exhibit, you must ask the judge to admit it
- This is where you will likely get an objection. Keep your cool and respond appropriately
- Lay additional foundation if asked, its not a big deal
- Have co-counsel, case agent, paralegal, or someone keep track of admitted exhibits for you. You should always have an up-to-date list of admitted exhibits

---

---

---

---

---

---

---

## Step 7: Publish to the Jury

- It doesn't do you any good to admit an exhibit if you don't show it to the jury. Put the exhibit before them in as large a format as you are able and explain its meaning to the jurors by asking questions to the witness
- Have the witness point out significant points, parts, or areas of interest which were significant to the investigation
- Utilize a document camera, projector, and/or TV screen for photos and videos
- Have a witness read a particular portion of a document
- If appropriate, pass the evidence to the jurors and allow them to handle it

---

---

---

---

---

---

---

## Step 7: Publish to the Jury

### Notes about handling evidence:

- Always wear gloves and have your witness wear gloves when dealing with physical evidence from a crime scene
- Have the witness demonstrate that a weapon has been made safe before presenting it to a jury. Never point a weapon at anyone, even if its been made safe
- Always make sure weapons and ammunition are kept separate. Never send both back to a jury at the same time
- Maintain chain of custody and evidence security during trial and after

---

---

---

---

---

---

---

---

## Step 8: Return the Exhibit to the Clerk

- Once evidence has been admitted, the clerk will need to note that as part of managing the evidence. If you assist him or her by handing them the exhibits once you have finished with them, they will love you
- Making a habit of this also helps prevent mistakes in the marking of evidence and the official record of the trial

---

---

---

---

---

---

---

---

## Example: Group of Photographs




---

---

---

---

---

---

---

---

## Example: Document

PERSONAL IDENTIFICATION									
NAME: <u>JOE B. BACCHINI</u> <u>10/17/71</u>					CLASS: _____				
DOB: <u>10/17/71</u>					HEIGHT: _____				
COLOR: _____		SEX: _____		HAIR: _____		EYES: _____		SKIN: _____	
Signature: <u>[Signature]</u>					Date: <u>10/17/16</u>				
Print Name: <u>JOE B. BACCHINI</u>					Print Date: <u>10/17/16</u>				

## Example: 911 call



## Common Objections

### • Lack of Foundation

Also, we note that where a partial foundation exists, it is incumbent upon the objecting party to specify what foundation is lacking so that the introducing party may address the issue. See *Packard v. Reidhead*, 22 Ariz.App. 420, 423, 528 P.2d 171, 174 (1974). While defendant made a foundation objection at trial, he did not indicate what foundation was lacking. - *State v. Rodriguez*, 186 Ariz. 240, 921 P.2d 643 (1996)

### • Chain of Custody

Detective Rea described from personal knowledge the chain of custody of the fluid samples from their collection at the autopsy to their delivery to DPS. To the extent his recollection of the events was incomplete or conflicted with testimony by other witnesses, these concerns go to the weight rather than the admissibility of the evidence. See *State v. Gonzales*, 181 Ariz. 502, 511, 892 P.2d 838, 847 (1995). The trial judge did not abuse his discretion in admitting the DNA evidence. - *State v. McCray*, 218 Ariz. 252, 183 P.3d 503 (2008)

## Common Objections

- “Prejudicial” under Rule 403 :
  - Nearly all evidence is prejudicial. If it didn’t incriminate the defendant, we wouldn’t seek to admit it. The standard for Rule 403 is “unduly prejudicial.”
- Remind the judge about cross-examination. Once the proper legal foundation is laid, any other questions go to weight, not admissibility

---

---

---

---

---

---

---

---

## Admitting Evidence: Tips and Tricks

- Always consider asking the Defendant for a stipulation concerning admission of certain evidence
  - Tons of photos
  - Redacted documents, videos, etc.
- You do NOT need the person who took the photograph to admit a photograph
- You do NOT need to call each and every person within the chain of custody
- Problems with evidence can usually always be solved by utilizing chain of custody records, additional witnesses, particular markings on an item, etc.

---

---

---

---

---

---

---

---

## Admitting Evidence: Tips and Tricks

- Try to address difficulties with highly contested pieces of evidence by getting pre-trial rulings and fighting about things outside the presence of the jury. If you anticipate a lengthy battle, give the judge a heads up before the jury comes in.
- Have witnesses authenticate recorded evidence (911 call, video, etc) ahead of time and initial the item. This will help save time and avoid awkwardness in court
- Remember, just because a piece of evidence exists, doesn’t mean a witness has seen or heard it. Most people don’t review recordings of their 911 calls after they make them.

---

---

---

---

---

---

---

---

**Questions???**

**Amy Diederich**

Deputy County Attorney

Pinal County Attorney's Office

Major Offender's Bureau

[amy.Diederich@pinalcountyz.gov](mailto:amy.Diederich@pinalcountyz.gov)

---

---

---

---

---

---

---